Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1997

ADELE BUZZETTI d/b/a COZY CABIN and VANESSA DOE, the first and last names being fictitious,

Petitioners,

vs.

THE CITY OF NEW YORK; THE DEPARTMENT OF CITY PLANNING; THE DEPARTMENT OF BUILDINGS; THE NEW YORK CITY COUNCIL; RUDOLPH W. GIULIANI, JOSEPH ROSE AND GASTON SILVA, in their official capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the New York City adult-business zoning ordinance discriminates against women in violation of the Fourtheenth Amendment because it imposes onerous land-use restrictions on clubs featuring barechested female performers but not on clubs featuring barechested male performers.

2. Whether the New York City adult-business zoning ordinance violates the First and Fourteenth Amendments because it selectively burdens erotic expression based upon the sex of the speaker.

INTERESTED PARTIES

All parties to this appeal are identified in the caption on the cover of this brief. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to be listed.

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Petitioners Adele Buzzetti and Vanessa Doe respectfully request that a writ of *certiorari* issue to review the judgment and opinion entered in this case on March 20, 1998, by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at __ F.3d __, (2d Cir. 1998). That opinion is set forth in the Appendix to this Petition at A, 1a-22a. The opinion of the United States District Court for the Southern District of New York is reported at 1997 WL 164284 (S.D.N.Y. April 8, 1997). That opinion is set forth in the Appendix to this Petition at B, 23a-37a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 20, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as the applicable provisions of the New York City Zoning Resolutions are set forth in the Appendix to this Petition at C, 38a-40a.

STATEMENT OF THE CASE

There is a substantial demand in New York City for barechested erotic dancers. No one disputes that this market includes both male and female performers. These dancers are similarly situated in every relevant respect. Through choreographed expression, they display their bodies for the erotic fascination of their audiences, for compensation.

New York City has nevertheless enacted a zoning ordinance to regulate topless clubs that draws an invidious gender distinction. It subjects only those clubs that feature female performers to onerous land-use restrictions that will force many of them to relocate or close. On the other hand, the ordinance leaves male erotic entertainers free to perform barechested in clubs located throughout New York City, without jeopardizing the stages upon which they dance. The blanket justification that the city throws over this naked bias is its alleged goal of curbing the so-called "secondary effects" on the community that have been associated with adult entertainment businesses. The city has no evidence, however, that topless clubs featuring female performers are more likely to generate secondary effects than clubs that spotlight men.

At its more abstract level, this case — about a small bar in Queens and a woman who works there — is at the crossroads of *eros* and equality. At its more immediate and material level, it is about job opportunities and restrictive sex stereotypes. At both levels, New York City's zoning ordinance, and the decisions of the courts below, are indefensible. Simply put, if a municipality is going to burden the communication of messages involving human sexuality based upon the messenger's gender, it had better demonstrate a convincing basis for doing so. The Constitution requires no less.

On October 11, 1996, in the United States District Court for the Southern District of New York, petitioners commenced this

action challenging Section 12-10 of Text Amendment N950384ZRY to the Zoning Resolutions of the City of New York ("section 12-10"). New York City's zoning ordinance subjects "adult eating and drinking establishment[s]" to numerous land-use restrictions, 7a, and section 12-10 defines such places to include clubs that "regularly feature[ ] . . . live performances which are characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities.' " 39a. Section 12-10 further defines "specified anatomical areas" to include the "female breast below a point immediately above the top of the areola." 4a. It similarly defines "specified sexual activities" to include "fondling or other erotic touching of . . . [the] female breast." *Id.* Petitioners claimed that the statute's exemption of male topless clubs from onerous land-use restrictions violates the Equal Protection Clause of the Fourteenth Amendment by placing a disparate burden on clubs featuring female performers. Petitioners also claimed that section 12-10 violates the First and Fourteenth Amendments by discriminating against protected expression on the basis of viewpoint. 24a.

Applying the "secondary effects" analysis adopted by this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court rejected both claims. Specifically, the district court decided that "[t]here is nothing to suggest" that the secondary effects of female topless clubs "are not substantially different" from clubs featuring male barechested performers, and therefore section 12-10's gender distinction is justified. 32a. The district court also concluded that "there are anatomical differences between males and females which in our society elicit different reactions," and thus section 12-10's gender based classification does not reflect any gender bias. 34a.

The court of appeals affirmed. Despite New York City's unavoidable concession that none of its secondary effects studies actually studied the relative community impact of male topless

clubs,[1] the Second Circuit held that "New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life are important," and that "the Zoning Amendment's regulation of female, but not male, topless dancing, . . . is substantially related to the achievement of New York City's objectives." 18a. The court of appeals therefore rejected petitioners' equal protection claim.

The Second Circuit was equally indifferent to petitioners' First Amendment claim. After summarizing the general principles set forth in *Renton*, 11a, the panel rejected petitioners' specific argument that the zoning ordinance gives rise to viewpoint discrimination because section 12-10 selectively burdens erotic expression based upon the dancers' sex. According to the court of appeals, because New York City did not specifically intend to suppress a female erotic perspective, section 12-10 is not unlawfully viewpoint biased. 13a.

These rulings contradict numerous decisions of this Court, as well as those of other Circuits. Relying on sex stereotypes and purported social conventions, the courts below have endorsed a gender classification that unfairly restricts the opportunities of women in a profession that is otherwise open to both sexes. Moreover, by casting legislative intent as a threshold requirement for claims of viewpoint discrimination, the Second Circuit has seriously blurred the critical line between the acceptable time, place and manner restriction approved by *Renton*, and what is, at best, New York City's *de facto* suppression of specific messages. Accordingly, petitioners' seek a writ of *certiorari* to review the court of appeals' decision.

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1. *See* Second Circuit Brief of Appellees City of New York, *et al.*, at 42.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S EQUAL PROTECTION RULING CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Just two terms ago, this Court forcefully restated the constitutional mandate that governs this case.

> [N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

United States v. Virginia, 116 S. Ct. 2264, 2275 (1996). The Court further underscored that

> "[i]nherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.

Id. at 2276. The decision below sterilizes these precepts.

At stake here is petitioner Vanessa Doe's "equal opportunity" to gain employment as a topless dancer, based upon her "individual talents and capacities." Section 12-10 severely limits that opportunity by placing onerous land-use restrictions on clubs like petitioner Adele Buzzetti's Cozy Cabin, which will be forced to close by the city. Because the dancers' sex is the statutory

trigger for these zoning restrictions, section 12-10 unquestionably discriminates on the basis of gender. *See Reed v. Reed*, 404 U.S. 71, 75 (1971); *Williams v. City of Fort Worth*, 782 S.W. 2d 290, 297 (Tex. App. 1989) (invalidating as invidious gender discrimination municipal regulation that prohibited "[c]lubs regularly featuring topless female dancers . . . within the zoned 1000 feet limits, while [permitting] clubs regularly featuring male topless dancers . . . within these limits").

In failing to enforce petitioners' equal protection rights, the Second Circuit's principal error was to place

> too much emphasis on the desirability of achieving the [City's] asserted statutory goal — prevention of [secondary effects] — and not enough emphasis on the fundamental question of whether the sex-based discrimination in [section 12-10] is *substantially* related to the achievement of that goal.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 488-89 (1981) (Brennan, J., dissenting); *see also Caban v. Mohammed*, 441 U.S. 380, 391 (1979); *Craig v. Boren*, 429 U.S. 190, 199-200 (1976). Even where "the State's objective is legitimate and important, [courts must] determine whether the requisite direct, substantial relationship between objective and means is present." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). This nexus must be "exceedingly persuasive," and the burden of proof "rests entirely on the State." *Virginia*, 116 S. Ct. at 2275 (internal quotation marks omitted). In this case, New York City completely failed to meet this "demanding" requirement. *Id.*

As the city has conceded, *see supra* at 4 n.1, none of the secondary effects studies upon which it relied to enact section 12-10 considered the secondary effects of male topless dance

clubs in relation to clubs that feature female dancers. (A44-241).[2] Consequently, under this Court's controlling decision in *Craig v. Boren*, 429 U.S. 190 (1976), the city cannot possibly justify the statute's discrimination.

In *Craig*, this Court invalidated an Oklahoma statute that established different legal drinking ages on the basis of sex. *See id.* at 204. The state argued that the law's underlying objective was "the enhancement of traffic safety," *id.* at 199, and had proffered statistical evidence regarding alcohol-related traffic violations among teenagers to justify the statute's gender classification, *id.* at 200-01. The Court struck the law, however, because Oklahoma's showing could not "support the conclusion that the gender based distinction closely serves to achieve [the traffic-safety] objective," *id.* at 200. Specifically, the Court rejected Oklahoma's purported justification for the challenged classification because

> many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here.

Id. at 203 (footnote omitted). Because New York City's secondary effects studies likewise "make no effort to relate their findings" to the challenged sex-based classification, the city's stated objective of minimizing the alleged negative impacts of adult entertainment establishments is also inadequate to justify section 12-10's disparate treatment of topless bars.[3] The Second Circuit simply disregarded *Craig*.

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2. Citations to "A" refer to page designations in the parties' joint appendix that was filed in the court of appeals.

3. Trying to cure this critical defect in proof, the city submitted an affidavit from Joseph B. Rose, Chairman of the New York City Planning Commission, to (Cont'd)

The court of appeals' second error has even more far-reaching and invidious implications. By invoking the purported "conventions of our society" — according to which the "public exposure of the female breast . . . almost invariably conveys sexual overtones" while "the male chest is routinely exposed . . . without involving any sexual suggestion" — the panel concluded that it was

> permissible for New York City, in its effort to achieve the objectives of the Zoning Ordinance, to classify female toplessness differently from the exhibition of the naked male chest.

20a. Unfortunately, this rationale erroneously accepts "as a defense to [section 12-10's] gender-based [classification] the very stereotype that the law condemns." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994) (internal quotation marks omitted). Indeed, it is precisely these types of "archaic and overbroad generalizations" that have repeatedly collapsed under the weight of the Equal Protection Clause. *Craig*, 429 U.S. at 198 (internal quotation marks omitted); *see e.g.*, *Caban*, 441 U.S. at 389; *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).[4]

(Cont'd)
the district court. (A287-311). After going on at length about the structure of the city's adult-business zoning regulations, and the general studies concerning secondary effects, Mr. Rose summarily stated that the city "has no evidence" that male topless clubs "create the type of negative community impacts that the adult establishments covered by [section 12-10] tend to produce." (A 311). Apart from simply recasting in less egregious terms the city's failure to inquire into the possible secondary effects of male topless clubs, Mr. Rose's explanation was "invented *post hoc* in response to litigation." *Virginia*, 116 S. Ct. at 2275. Consequently, the court of appeals' reliance upon the Rose affidavit to justify section 12-10's gender discrimination, 18a-19a, was clearly improper. *Virginia*, 116 S. Ct. at 2275.

4. Furthermore, in applying these social conventions, the court of appeals (Cont'd)

This Court has unambiguously instructed that

> the test for determining the validity of a gender based classification is straightforward, [and] must be applied free of fixed notions concerning the roles and abilities of males and females.

Mississippi Univ. for Women, 458 U.S. at 725. The courts below violated this rule. Because this case involves regulation of adult entertainment establishments, the Second Circuit's judgment necessarily (and ironically) "perpetuate[s] the stereotyped view" that only women are (or should be) sex objects. *Id.*, at 729; *cf. Aids Action Comm. v. MBTA*, 42 F.3d 1, 12 (1st Cir. 1994) (describing "overtly sexual" film advertisements as "represent[ing] the *conventional* exploitation of women's bodies for commercial advertising"). Any such suggestion, however, plainly conflicts with petitioners' unrebutted expert evidence that discusses the recent

> socioeconomic trends [that] offer significant opportunities for employment and remuneration for attractive men who display their chest area during posing and dancing for audiences of both genders.

(Cont'd)
ignored the *legal* conventions that should have informed its decision. The court's debatable assumption that the "public exposure of the female breast . . . almost invariably conveys sexual overtones" 20a is insufficient under New York law to prohibit women from walking about barechested in public parks. *See People v. Santorelli*, 80 N.Y. 2d 875, 877, 587 N.Y.S. 2d 601, 602-03 (1992). And whatever role these social conventions may properly play "in protecting the moral sensibilities" of those who "do not want to be exposed willy-nilly to public displays of various portions of their fellow citizens anatomies," *United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991) (upholding indecency law that prohibited women from appearing barechested in public), they certainly have no rational application to private fora (such as topless bars) that are specifically dedicated to voluntary, adult audiences seeking erotic entertainment.

(A243). It also ignores the several clubs in New York City that specifically feature barechested, erotic male dancers. (A279-281).[5]

Clearly, the sociological premise for the Second Circuit's holding is "more consistent with the role-typing society has long imposed, than with contemporary reality." *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (plurality) (internal quotation marks and citations omitted). Indeed, the crux of its decision "is surely based on generalizations (stereotypes) about the way that women (or men) are." *Miller v. Albright*, 118 S. Ct. 1428, ___, 1998 WL 186812 at *25 (U.S. April 22, 1998) (Ginsburg, J., dissenting). For example, the panel's assumption that female topless clubs are likely to generate more crime and neighborhood decay than male clubs presupposes certain sex-based, behavioral proclivities — *i.e.*, that female dancers, and audiences comprised primarily of heterosexual men or lesbians, are more prone to engage in vice than their counterparts.

"Once those traditional notions [are] abandoned, [however,] no basis for finding a substantial relationship between [section 12-10's] classification and objective remain[s]." *Mississippi Univ. for Women*, 458 U.S. at 726 n.11.

Finally, the decision of the court of appeals adds to the ongoing confusion as to the proper role of biology in assessing claims of gender discrimination. Misconstruing this Court's plurality opinion in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Second Circuit reached the overbroad conclusion that

> [s]tatutes that fairly can be seen as responding to clear sexual differences between men and women are among

5. Neither the district court nor the court of appeals acknowledged any of the representative male topless clubs in the record except for Chippendales. 31a-32a; 18a.

> those laws that courts have upheld, despite the gender-based classifications contained within them.

17a.

This interpretation mistakes social psychology for sexual physiology. Rather than openly addressing the diversity of sexual roleplay revealed by petitioners' equal protection claim, the panel used secondary sex characteristics to justify section 12-10's gender inequity. *Michael M.* does not condone this result. It merely recognizes that, under the Equal Protection Clause, "physiological differences between men and women [need not] be disregarded." 450 U.S. at 481 (Stewart, J., concurring). Because this case does not involve a legal classification based upon biological processes, *Michael M.* is inapposite.

Justice Stevens' dissent in *Michael M.*, however, suggests a sensible principle to guide the resolution of disputes, like this one, that focus on superficial anatomical differences between the sexes:

> In cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant, and sometimes wholly irrelevant. If those differences are obviously irrelevant, the discrimination should be presumptively unlawful in the same way that racial classifications are presumptively unlawful.

Id. at 498 (Stevens, J., dissenting). This Court has recently moved closer towards adopting such a rule, observing that

> "[i]nherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.

Virginia, 116 S. Ct. at 2276. Regardless of whether "differences" between the male and female breast are "natural" or "inherent," they are "obviously irrelevant" to all those employed as topless dancers. "By providing dissimilar treatment for men and women who are thus similarly situated, [section 12-10] violates the Equal Protection Clause." *Reed*, 404 U.S. at 77.

In short, because this case provides a ready vehicle for clarifying the category of "enduring" "[p]hysical differences between men and women" that carry legal significance, *Virginia*, 116 S. Ct. at 2276, and because Second Circuit's judgment contradicts settled law in any event, this Court should grant *certiorari* review.

II.

THE SECOND CIRCUIT'S FIRST AMENDMENT RULING CONFLICTS WITH NUMEROUS HOLDINGS OF THIS COURT, AND WITH THOSE OF THE FIRST, THIRD, AND NINTH CIRCUITS.

Relying on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court of appeals rejected petitioners' viewpoint discrimination challenge to section 12-10's disparate treatment of topless dance clubs ostensibly because "the Zoning Amendment is not *aimed* at suppressing the viewpoint of female eroticism." 13a (emphasis added). Even under the "time, place, and manner" analysis applied in *Renton*, however, *see* 475 U.S. at 46-47, the Second Circuit's application of the governing First Amendment principles was erroneous.

This Court has recently, repeatedly, and consistently admonished that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' " *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S.

105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Mindful of this warning, the Ninth Circuit has concluded that "government must remain scrupulously neutral when it regulates activity protected by the First Amendment," and that courts should "not hesitate[ ] to strike down laws that are facially neutral but have discriminatory impact on First Amendment rights." *Service Employees Int'l Union v. Fair Political Practices Comm.*, 955 F.2d 1312, 1320 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Similarly, the First Circuit has held that the mere "unrebutted *appearance* of viewpoint discrimination," much less intentional censorship, violates the First Amendment. *Aids Action Comm. v. MBTA*, 42 F.3d 1, 10 (1st Cir. 1994). The decision below, which rests on New York City's seeming lack of discriminatory motive in enacting section 12-10, conflicts with these more exacting First Amendment standards.

Moreover, *Renton* does not insulate section 12-10 from petitioners' viewpoint discrimination claim. *Renton* upheld an adult-business zoning regulation against a content-discrimination challenge because the challenged ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47. *Renton* did not suggest, however, that the "secondary effects" rationale would support the content-neutrality of a zoning ordinance that places restrictions on adult entertainment businesses according to the particular erotic messages that they convey to their customers. To the contrary, this Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co.*, 460 U.S. at 592. Because "[v]iewpoint discrimination is . . . an egregious form of content discrimination," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819,

829 (1995), *Renton*'s "secondary effects" rationale should not extend to this case.

Indeed, there can be no question that section 12-10 discriminates against protected erotic expression on the basis of both content and viewpoint. New York City permits the existence of topless dance clubs, but imposes onerous zoning restrictions only upon clubs featuring female performers. "Thus, by any commonsense understanding of the term, [section 12-10] is content based," and therefore cannot qualify as a valid time, place and manner restriction. *Discovery Network, Inc.*, 507 U.S. at 429; *see also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

Whether or not intentional, it is also obvious that section 12-10's challenged gender classification burdens only expression conveyed by women. As Justice Souter has observed,

> where [a] dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of the erotic experience.

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J. concurring in the judgment). Clearly, the dancer's sex is an essential aspect of his or her endorsement. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994). For example, the erotic message that Vanessa conveys to her male audiences at the Cozy Cabin communicates a different "premise," "perspective," or "standpoint" on human sexuality, *Rosenberger*, 515 U.S. at 831, than the message conveyed by male dancers in New York City's gay clubs, *accord Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (parade participation by gay and lesbian group would communicate a

"view that people of their sexual orientation have as much a claim to unqualified social acceptance as heterosexuals"); *see also Williams v. City of Fort Worth*, 782 S.W. 2d 290, 297 (Tex. App. 1989) (whether "the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal" is a "viewpoint [that] might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer").

By enacting the gender distinction contained in section 12-10, New York City has "regulate[d] speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Given that topless dancing is permitted by the city, the statute's disparate treatment of clubs featuring female performers selectively limits the ability of those dancers to express their views "on an otherwise includible subject," *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (internal quotation marks omitted). This is the very essence of viewpoint discrimination, and section 12-10 is therefore "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Furthermore, New York City completely "failed to explain away" the viewpoint discrimination imposed by section 12-10. *Aids Action Comm.*, 42 F.3d at 10. Because the city made no inquiry whatsoever as to any gender-related impacts that erotic performers may or may not have on the surrounding communities, there is no evidentiary basis in the record to uphold the challenged distinction. This Court has repeatedly held that a purported time, place, and manner regulation may only discriminate within a general class of speech upon a showing that the restricted expression is " 'clearly more disruptive' " than the unrestricted expression. *Carey*, 447 U.S. at 459-60 (quoting *Mosley*, 408 U.S. at 100); *see also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981) (plurality); *accord Schad v. Mount Ephriam*, 450 U.S. 61, 73

(1981). Simply put, "even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975).[6]

On this point, the Court's decision in *Discovery Network*, 507 U.S. at 430, should be controlling. Requiring a demonstrable correlation between a challenged speech restriction and the particular secondary effects that the restriction was alleged to mitigate, the Court in *Discovery Network* refused to apply *Renton*'s "secondary effects" analysis to sustain a newsrack regulation that distinguished between newspapers and commercial handbills. *Id.* ("In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to [newsracks for handbills] that distinguish them from the newsracks [for newspapers] that Cincinnati permits to remain on the sidewalks."). Following this guidance, the Third Circuit has squarely held that, "[u]nder the secondary effects analysis, speech that is prohibited must produce a greater secondary effect than speech that is permitted." *Rappa v. New Castle County*, 18 F.3d 1043, 1069 (3d Cir. 1994). The Second Circuit has now taken a different view.

In sum, New York City has demonstrated absolutely no connection between the viewpoint discrimination imposed by

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6. Given that the New York City made no inquiry (or findings) with respect to the secondary effects of male topless establishments, the court of appeals' observation in dictum that the gender-neutral regulation of topless entertainment might be impermissibly overinclusive under the First Amendment, *see* 20a-22a, is completely unfounded. Furthermore, in making this observation, the court of appeals apparently ignored the limited nature of petitioners' legal challenge. Petitioners have never argued that either male or female nudity should be regulated in the same manner in all circumstances. Rather, petitioners merely assert that erotic topless entertainment should be treated equally, absent evidence that would justify discrimination.

section 12-10 and the general goal of reducing secondary effects. The court of appeals flatly ignored this defect. 9a-15a. Instead, staking all on New York City's promise of urban betterment, the Second Circuit has dangerously retreated from the strict controls historically placed upon time, place and manner restrictions — controls that have so far kept the "secondary effects" doctrine from becoming an easy cover for censorship. This deviation from established First Amendment jurisprudence warrants the Court's review.

CONCLUSION

For the foregoing reasons, petitioners seek a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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